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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner*,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF OF RESPONDENT

E. W. DILLON,
Columbus, Ohio
C. F. HAYNSWORTH, JR.,
F. DEAN RAINEY,
Greenville, S. C.
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 171

MARY BELL KING, *Petitioner,*

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

BRIEF OF RESPONDENT

REPORT OF THE OPINIONS IN THE DISTRICT AND CIRCUIT COURTS.

The opinion of the District Court, dated May 24, 1946, is reported in 65 Federal Supplement, page 740.

The opinion of the Circuit Court of Appeals, dated April 9, 1947, is reported in 161 Federal Second, page 108.

GROUNDS OF JURISDICTION.

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 936, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38, of the Supreme Court, together with diversity of citizenship and the jurisdictional amount.

ARGUMENT

I

There is nothing in the decisions of the Supreme Court of South Carolina in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in this case. The question presented to the Circuit Court of Appeals has not been presented to the Supreme Court of South Carolina nor has that court in any way intimated that it might reach a conclusion at variance with that of the Circuit Court of Appeals.

The dictum in the concurring opinion of Judge Blease in *Bolt v. Life & Casualty Insurance Company of Tennessee*, 156 S. C. 117, 119-120; 152 S. E. 766, 767 (1930), upon which the petitioner relies, is not supported in the recent decisions of that court. Since the decision in the *Bolt* case in 1930 the personnel of the Supreme Court of South Carolina has completely changed, and the recent pronouncements of that court are not in keeping with the inference the petitioner seeks to draw from the dictum of Judge Blease.

In the more recent case of *Haselden v. Standard Mutual Life Ass'n.*, 190 S. C. 1, 5; 1 S. E. (2d) 924, 926 (1939), the Supreme Court of South Carolina said:

> "* * * * Stated more fully, the rule is, that where by reason of ambiguity in the language employed in a contract of insurance, there is doubt or uncertainty as to its meaning, and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the company, the former will be adopted.
>
> "We held in *Prosser, et al. v. Carolina Mut. Ben. Corp.*, 179 S. C. 138, 183 S. E. 710; that where the language of an insurance contract may be understood in more senses than one, or where it is doubtful whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the insured."

In all of its recent references to this principle of contract interpretation, the Supreme Court of South Carolina has used qualifying words consistent with the language quoted above from the *Haselden* case and quite inconsistent with the dictum of Judge Blease in the *Bolt* case.

Before the principle of strict construction against an insurer has any application in the courts of South Carolina, "the policy must be susceptible to two equally reasonable interpretations", *Walker v. Commercial Casualty Ins. Co.*, 191 S. C. 187, 194, 4 S. E. (2d) 248, 250-251 (1939). To the same effect, see also *Kittles v. General American Life Ins. Co.*, 182 S. C. 162, 174-175; 188 S. E. 784, 789 (1936). Before the case is to be determined by an application of the rule of strict construction against an insurer, there must remain after application of all other aids to interpretation a real ambiguity, a "fair and reasonable doubt as to the meaning of the provisions ****", *Smith v. Sovereign Camp W. O. W.*, 204 S. C. 193, 198; 28 S. E. (2d) 808, 810 (1944).

The Supreme Court of South Carolina has clearly stated in *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 199 S. C. 325, 332, 19 S. E. (2d) 463, 466 (1942):

> "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. *** Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.
>
> "The judicial function of a Court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the Courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended.***"

The same principle is set forth in the decisions in the cases of *Brown v. Mutual Life Ins. Co. of N. Y.*, 186 S. C. 245, 252-253, 195 S. E. 552, 555 (1938); *Kittles v. General American Life Ins. Co.*, 182 S. C. 162, 174; 188 S. E. 784, 789 (1936); and *Bolen v. Capital Life and Health Ins. Co.*, 208 S. C. 345, 348, 38 S. E. (2d) 79, 80 (1946). In the last two cases the language used is an acknowledged quotation from the language of this court in *Bergholm v. Peoria Life Insurance Company of Peoria, Illinois*, 284 U. S. 489, 492; 52 S. Ct. 230, 231; 76 L. Ed. 416 (1932).

It is apparent that in construing insurance contracts, the Supreme Court of South Carolina applies those principles of contract construction universally recognized by courts of this country. It does so in language which might be used and approved by the courts of any other state. Its language and its holdings are entirely consistent with the conclusion and the language of the Circuit Court of Appeals for the Fourth Circuit in the present case.

The Circuit Court of Appeals for the Fourth Circuit found nothing equivocal in the language of the policy. The words excluding liability "for death resulting from participation **** in aviation" are plain and direct. There is nothing hidden, secretive, equivocal or dubious in them. From them the intent of the parties to exclude liability for a death which results, in the ordinary signification of the word "results", from participation in aviation is clear. That intention being clear, it was the duty of the court, in the language of the South Carolina Supreme Court in the case of *S. S. Newell & Co. v. American Mut. Liability Ins. Co.*, 199 S. C. 325, 332; 19 S. E. (2d) 463, 466 (1942), to liberally construe the policy in order to carry out the evident intention of the parties and not to exercise inventive powers for the purpose of creating doubt or ambiguity.

The insured's death after being forced down at sea in midwinter in a land based plane, even though the insured survived the peril of contact with the water only to die

later of drowning, seems clearly to have resulted from the flight within the evident intent of those words in the policy. In so holding the Circuit Court of Appeals was dealing less with principles of contract interpretation than with principles of proximate causation.

The matter is one of proximate causation, not one of "accidental means", and cases dealing with the question of what constitutes accidental means within the terms of an accident insurance policy have no application to this case where all agree the insured's death was occasioned by accidental means.

The Supreme Court of South Carolina has said (*Horne v. Atlantic Coast Line*, 177 S. C. 461, 469-470; 181 S. E. 642, 646 (1935)):

> "The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred * * *.
>
> Any cause intervening between the first * * * cause and the final injury, which might reasonably have been foreseen or anticipated * * * is not such efficient intervening cause as will relieve the original * * * of its character in law as the proximate cause of the final injury."

While the Supreme Court of South Carolina has not decided the question presented in this case, a review of its decisions and the language it employs, particularly in the more recent cases, justifies a reasonable expectation that, had the question been presented to it, it would have reached the same conclusion as the Circuit Court of Appeals for the Fourth Circuit. Certainly there is nothing to indicate the contrary.

II

The decision of the Court of Common Pleas for Spartanburg County, South Carolina, in a similar case should

have no greater effect than the Circuit Court of Appeals for the Fourth Circuit accorded it. (T. 25). The Circuit Court of Appeals, informed of the standing of such decisions in South Carolina, properly observed that the decision is not binding on other South Carolina Courts, was rendered in reliance on the District Court opinion in the present case and the petitioner did not contend that it was binding on the Circuit Court of Appeals.

Since the decision of the Circuit Court of Appeals, the identical question was passed upon by the Court of Common Pleas for Greenville County, South Carolina, the order of that court being reproduced in full in the appendix hereto at pages 17-24. The Court of Common Pleas for Greenville County, South Carolina, reached a conclusion in complete harmony with that of the Circuit Court of Appeals in the present case. It pointed out that the decisions of Courts of Common Pleas in South Carolina do not constitute precedents in other cases in the Courts of Common Pleas and it refused to follow the decision of the Spartanburg Court.

The Courts of Common Pleas in South Carolina are trial courts. They are not intermediate appellate courts such as exist in some of the more populous states. While certain other courts have concurrent, though limited, jurisdiction of civil matters, the Courts of Common Pleas have unlimited jurisdiction, as the courts of original incidence, in all such matters. Magistrate's Courts, for instance, have concurrent jurisdiction to hear law cases where the amount claimed is less than $100.00 (1942 Code of Laws of South Carolina, Sec. 257), but the claimant may, at his option, bring his suit initially in the Court of Common Pleas (Art. 5 South Carolina Constitution of 1895, Sec. 15, and see *Rhodes v. Railroad Co.*, 6 S. C. 385).

While the Courts of Common Pleas have a very limited appellate jurisdiction, principally as to appeals from Magistrate's Courts, the great burden of their work is the original trial of proceedings originally commenced within

their jurisdiction. Civil actions are begun in the Courts of Common Pleas by the service of a summons and complaint and all issues of fact in law cases are tried before a jury, unless the parties otherwise agree.

While the State is divided into fourteen judicial circuits (1942 Code of Laws of South Carolina, Vol. 1, Sec. 50), each of which has a Circuit Judge (South Carolina Constitution of 1895 Art. 5, Sec. 13), there is a clerk for the Court of Common Pleas in each of the State's forty-six counties (South Carolina Constitution of 1895, Art. 5, Sec. 27). In general, actions in the Court of Common Pleas are required to be tried in the county where the subject thereof is situated, where the cause arose or where the defendant resides, subject to a change of venue under certain circumstances (1942 Code of Laws of South Carolina, Title 6).

The decisions of the Courts of Common Pleas are not published in printed form. As set forth in the certificate of The Honorable D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina (reproduced in the appendix of this brief at page 16) the orders and decisions of the Courts of Common Pleas are filed in the office of the clerk of that Court in the county in which the case is tried. Such decisions are indexed only under the names of the parties to the action, and no index, file or digest of any type is made or maintained as to subject matter. No interested person could be informed as to all of the decisions of the Courts of Common Pleas on any question except upon a detailed examination of each separate judgment roll in the office of the Clerk of the Court of Common Pleas for each of the State's forty-six counties.

The decisions of the Courts of Common Pleas in South Carolina are, therefore, practically and effectively unavailable to the judiciary and to the bar for use as precedents. In the federal courts, those decisions are, effectively, and as a practical matter, unavailable as data from which to draw any conclusion as to what the state law may be.

This court has held in *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 61 S. Ct. 176; 85 L. Ed. 109; *Six Companies of California v. Joint Highway District No. 13*, 311 U. S. 180, 61 S. Ct. 186; 85 L. Ed. 114; and *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, and similar cases, that the federal courts, in the absence of a decision by the court of last resort of a state, should look to other available data from which the state law might be established. The data under consideration in those cases, such as the decisions of intermediate state appellate courts, was readily available to counsel and to the court. They were decisions of courts whose decisions are regularly published in printed form and readily available in the offices of attorneys practicing in those states and in the libraries of courts sitting therein.

There is no such availability of the decisions of the Courts of Common Pleas of South Carolina. It is only by reason of the fortuitous circumstance that the petitioner and her counsel had a similar case in the Court of Common Pleas for Spartanburg County that this Court and the Circuit Court of Appeals were informed of that decision. It is only by reason of the fortuitous circumstance that one of the counsel for the respondent participated in an action involving the same substantive question in the Court of Common Pleas for Greenville County, that this Court is informed of that decision. There may be in the forty-four other counties of South Carolina numerous decisions on file on the same substantive question, but neither this court, nor the Circuit Court of Appeals nor counsel can be informed of them.

Though by fortuitous circumstances, a decision of a Court of Common Pleas may become available to a federal court for its consideration, that at chance occurrence does not mean that the decisions of the Courts of Common Pleas in general are available as data in determining the state law. When a federal court well knows that on a given subject,

there may be many decisions of the Courts of Common Pleas reaching varying conclusions, the fortuitous presentation of one of those decisions should not control the result of the action in the courts of the United States.

When there is the probability that there are many decisions by courts of equal rank, resort to one as establishing the law of all would mean that the result of litigation in the federal courts is to be determined by chance. He who is lucky enough to be informed of a decision of a Court of Common Pleas in his favor would prevail, though he and the court well knew a probability that the Courts of Common Pleas had decided many such cases, perhaps with contrary conclusions. Weird and extraordinary results would necessarily follow.

The blind man who, wishing to know what an elephant was like, seized upon the tail and concluded the elephant was like a snake was no more inaccurate than the Federal Courts would be if, without opportunity of investigating other decisions, they should be required to accept any given decision of the Courts of Common Pleas of South Carolina as establishing the law of that state. The law of the State of South Carolina cannot be accurately shown by considering the tail alone, blind to everything else.

The question now before this Court, in effect, was considered by the Circuit Court of Appeals for the Seventh Circuit in the case of *Brainard v. Commissioner*, 91 Fed. (2d) 880, 883. In that case the court said,

> "Appellant - - - has presented to us a duly authenticated decree of the Circuit Court of Cook County, Illinois, in a case wherein this appellant filed his complaint in chancery, against his wife and mother, for the construction of this trust with respect to the question now before us. That Court differs with us as to the construction and effect of appellant's declaration of trust, and his subsequent acts with respect thereto. With due deference to that Court, however, we cannot accept the

> ruling as an expression of the judgment of the State of Illinois as to the property rights of her citizens in the interpretation of local laws. That Court's jurisdiction is limited to Cook County and there are close to a hundred other Circuit Courts in Ilinois of equal jurisdiction which are not bound by the rulings of the Cook County Circuit Court. In the interpretation of the laws of Illinois, we must look to the decisions of the Supreme Court and Appellate Courts of that state, for their rulings are binding upon all inferior courts of Illinois.'"

A decision of a Court of Common Pleas in South Carolina does not constitute a precedent in that or any other court in that state. It is binding upon the parties to that particular suit unless and until it is reversed on appeal, but a decision of any magistrate or justice of the peace has the same effect. The decisions of the Courts of Common Pleas have no greater effect.

The Honorable D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina, in his certificate (appendix p. 16) states, "* * * under the practice in this State an unappealed decision of the Court of Common Pleas * * * would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina".

The Honorable Wm. H. Grimball, Circuit Judge, presiding at the fall term of the Court of Common Pleas for Greenville County, South Carolina, in the case of *Gilman F. Thompson, Sr. v. New York Life Insurance Co.* (appendix p. 17) dealt with the same matter. He was considering the same question presented to the Circuit Court of Appeals in the instant case and, referring to the decision of the Court of Common Pleas for Spartaburg County upon which the petitioner in this case now relies, Judge Grimball said:

> "Counsel for the plaintiff has referred to a decision of Judge Sease in the Court of Common Pleas for Spartanburg County in the case of *King*

v. Commonwealth Life Insurance Company of Louisville, Ky. In that case Judge Sease relied upon and followed the decision of Judge Wyche, subsequently reversed, in the Federal District Court in the case of *King v. United Commercial Travelers.* But for the fortuitous circumstance that Judge Sease's decision was rendered in the interim between the District Court decision in the United Commercial Travelers case and the reversal of the District Court by the Circuit Court of Appeals, Judge Sease would probably have reached a different conclusion.

"Other Circuit Judges in this State may have reached conclusions different from Judge Sease's in similar cases, but whatever their conclusions and whatever the basis of Judge Sease's reasoning, this Court looks only to the Supreme Court of South Carolina for guidance and direction. The decisions of other courts are persuasive only to the extent their reasoning is persuasive to the mind of this Court. This Court finds the reasoning of the Circuit Court of Appeals in the recent King case persuasive and sound."

The decision in the Thompson case, contrary to the decision upon which the Petitioner relies as establishing the law of South Carolina, is an emphatic showing that the decision of the Court of Common Pleas of Spartanburg County did not establish the law of the State. A court of equal rank has held that it was not a precedent and has decided the substantive question with an entirely opposite result.

A decision of a Court of Common Pleas of South Carolina should have no greater effect in the Federal Courts than it has in comparable state courts. It is not a precedent in the court in which it was rendered; it should not have greater, certainly not controlling, effect in the federal courts.

The now established proposition that the same rule of law should govern the result in diversity cases whether the case is tried in the state or federal court, requires that the

federal court give the same, but no greater, effect to decisions of state trial courts which the state trial courts themselves would give it. If the federal courts are required to give such decisions greater, even controlling, effect disparity, rather than conformity is the result. If the federal courts are required to treat as establishing the law of the state a decision of a Court of Common Pleas which as a result of fortuitous circumstances may be presented to it, even though it knows there may be several decisions reaching diametrically opposite conclusions, it will be required to be bound by a fragmentary bit of evidence from data which as a whole is entirely unavailable to the court. If the federal court is bound by a decision of a Court of Common Pleas, it will be required in seeking the elephant to grasp the tail and call it a snake.

The Circuit Court of Appeals for the Fourth Circuit is entirely familiar with the courts of South Carolina and the practical situation in that state. The decision of the Circuit Court of Appeals in the present case was rendered against a background of that knowledge. The decision of the Circuit Court of Appeals is in conformity with the practical necessities of orderly trials and the promotion of justice. It is supported in substance and in its appraisal of the decision of the Court of Common Pleas for Spartanburg County by the later decision of the Court of Common Pleas for Greenville County. It promotes and furthers the rule of conformity first enunciated in the decision of this court in the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

III.

This case has been presented as if the result is to be governed by the laws of the State of South Carolina. However, it appears that under the recent decision of this court in the case of *United Commercial Travelers of America v. Wolfe*, — U. S. —; 67 S. Ct. 1355; 91 L. Ed. 1245 the laws of Ohio rather than those of South Carolina are

controlling. Since there are no appellate court decisions in either state on the question presented by the case, a determination of whether the laws of Ohio or those of South Carolina are controlling has not appeared heretofore of any materiality.

Paragraph No. 3 of the Findings of Fact of the District Court (Tr. 1) is as follows:

> "3. The defendant is a Fraternal Benefit Association organized and maintained for the purpose, among other things, to 'establish funds to indemnify its members for disability or death resulting from accidental means'; incorporated under the laws of the State of Ohio, and licensed to do business as a fraternal benefit association in the State of South Carolina."

In the District Court opinion it is set forth that the parties stipulated to the same effect (Tr. 5). Both the District Court and the Circuit Court of Appeals held that the contract of insurance was a South Carolina contract "and it must be governed, solved and construed by the laws of this State" (Tr. 4 and 21).

The opinion of the Circuit Court of Appeals was handed down on April 9, 1947. Thereafter, on June 9, 1947, the Supreme Court of the United States decided the case of *The Order of United Commercial Travelers of America v. Edward C. Wolfe*, —U. S.—; 67 S. Ct. 1355, 91 L. Ed. 1245, a case involving this identical defendant and the identical contract which is now before this court. That decision clearly and unequivocally lays down the rule that the law of the domicile and not the law of the forum must be looked to in construing the contract of insurance issued by a fraternal beneficiary society. In its concluding paragraph the Supreme Court said:

> "this Court consistently has upheld, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation."

It will thus be seen that even if a court of last resort in South Carolina had passed upon the identical question here involved, the full faith and credit clause of the United States Constitution would require that the construction and validity of this clause be determined according to the law of Ohio rather than the law and decisions in South Carolina; indeed, this court in the *Wolfe* case did not base its decision upon the question as to the place of contract, saying:

> "We rely upon the character of the membership obligation sued upon. There is substantial evidence to support a contention that the contract of membership, including all insurance rights, was made in Ohio and that many acts in connection with the contract were required to be performed in Ohio and were so performed. *However, we do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance.* We rely, rather, upon its character as something created, regulated and subject to change through a fraternal and representative form of intra-corporate government, dependent for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal societies." (Emphasis ours.)

The case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817; 82 L. Ed. 1188, is therefore not applicable for the court in the *Erie* case said:

> "Third. Except in matters *governed by the Federal Constitution* or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." (Emphasis ours.)

The Courts of Ohio have not had occasion to pass upon an aviation clause similar to the one at bar, but the latest expression of the Supreme Court of Ohio on the question of construction of insurance contracts, which case inci-

dentally involved an aviation clause, is that of *McBride v. Prudential Insurance Co.*, 72 N. E. (2) 98. The syllabi are as follows:

> "1. Policies of insurance prepared by an insurance company and reasonably open to different interpretations will be construed most favorably to the insured.
>
> "2. An insurance policy is a contract and in the construction thereof, the words therein should be given their usual and ordinarily accepted meaning.
>
> "4. In a life policy limiting liability to return of premiums in case of death as the result of riding in aircraft except as a passenger on a 'regularly scheduled passenger flight' of a commercial aircraft, the quoted words mean trips regularly scheduled as to time of departure and arrival by commercial airlines operating between definitely established airports."

A succinct statement of the rule which must be applied where there is no statutory law or decisions is set forth in 24 Cor. L. Q. 54, as follows:

> "If the courts of the state *whose law is applicable* have never passed upon the problem, what is the law which the Federal Court must apply? The Federal Court must do what it thinks a court of the state whose law is applicable would do * * *." (Emphasis ours.)

Respectfully submitted,

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Counsel for Respondent

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

I, D. Gordon Baker, Chief Justice of the Supreme Court of the State of South Carolina, do hereby certify:

1. That under the practice in this State an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina.

2. That the decisions of the Court of Common Pleas are not, and have never been, published in printed form in this State; that such decisions are filed in the office of the Clerk of said Court for the County in which the case is tried and are indexed only under the names of the parties thereto; that no index, file or digest is made or maintained as to subject matter and there exists no means by which the decisions of such Court upon any subject could be determined, other than by a detailed examination of each judgment roll on file in the offices of the Clerks of Court for each of the State's forty-six Counties.

At Florence, S. C., this 14th day of November, 1947.

D. Gordon Baker
Chief Justice of The
Supreme Court of the State
of South Carolina

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

I, J. B. Westbrook, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that Honorable D. Gordon Baker is the duly elected and qualified Chief

Justice of the Supreme Court of the State of South Carolina and that the signature to the attached certificate is genuine.

Given under my hand and the seal of said court this 18th day of November, 1947.

(Official Seal)

J. B. Westbrook
Clerk of the Supreme Court of the State of South Carolina

IN THE COURT OF COMMON PLEAS
GREENVILLE COUNTY, SOUTH CAROLINA

Gilman F. Thompson, Sr.

vs.

New York Life Insurance Co.

ORDER

By his complaint, the plaintiff alleged the issuance of a policy of life insurance by the defendant to Gilman F. Thompson, Jr., son of the plaintiff in the face amount of $1,000 with double indemnity provisions in case the death of the insured resulted from accidental means. The complaint alleges, on information and belief, that the insured died on or about October 12, 1945 and that the death resulted from accidental means.

By its answer, the defendant admitted the allegation that the insured died on or about October 12, 1945, but alleged that the insured, an officer in the Army Air Corps, died as a result of the crash of a plane, of which the insured was the navigator, in the vicinity of the Bonin Islands and set up certain provisions of the policy fixing the defendant's liability in the event the death of the insured should result from an act of war or an act incident to war or from operating or riding in any kind of aircraft except as a fare-paying passenger of a commercial airline and flying on a regularly scheduled route between definitely established airports.

At the trial of the case, the defendant offered evidence of the circumstances of the insured's death including certified copies of records of the Casualty Section of the Adjutant General's Office of the War Department. These records, abundantly identified by a deposition of an official having official custody of the records and whose duties include the maintenance and handling of such records, are required to be kept by the regulations of the War Department. In that Section the records with respect to all casualties are kept and maintained. In them is assembled and recorded in official form all pertinent information regarding the circumstances of each casualty, and copies of communications addressed to the next of kin are there on file.

The Court admitted the deposition and supporting copies of the official records of the Casualty Section of the Adjutant General's Office. Under the circumstances, such evidence appears to be the best and most reliable evidence of the fact of death and the surrounding circumstances. If such records are not admissable, the next of kin and the beneficiaries of insurance policies, in a large proportion of the cases, could not prove the fact of death of war and battle casualties. It is common knowledge that in a large proportion of the cases eye witnesses could not be located by the families of the decedent and brought before the Court. Under the circumstances the official army records seem the best and the proper method of proving the death and the surrounding circumstances.

The evidence showed that the insured at the time of his death was a 2nd Lieutenant in the Army Air Corps attached to the Troop Carrier Command in the Far Pacific Area. From such evidence, it appears that on October 12, 1945, the insured, on a troop ferrying mission, left Naha Airfield on Okinawa in the Ryukyu Islands as a member of the crew of a C-46 type military plane bound for Iwo Jima in the Volcano Islands. The plane reported by radio

from the vicinity of the Bonin Islands, but was never thereafter heard from. Extensive search was conducted of the area in which the plane might have gone down, both of the sea area and of islands in the area, but no trace could be found of the plane, its crew or its passengers.

In due course, the War Department reported to the plaintiff that the insured was missing. Subsequently it was reported to the plaintiff that his son had been killed on the day he previously had been reported as missing, no trace having been found in the interval of the plane or of the insured and the other occupants of the plane.

The defendant at the close of the evidence made a motion for a directed verdict for the plaintiff for the sum of $101.49, representing a return of premiums, dividends, etc., and interest on such items upon grounds that the war and aviation provisions of the policy severally limited the liability of the defendant to such amount.

The Plaintiff made a motion for a directed verdict for the plaintiff for $1,000.00 with interest from October 12, 1945 upon grounds that the proof did not establish that the insured died as a result of an act of war or of an act incident thereto, or as a result of an airplane flight.

In connection with the motions the plaintiff tacitly abandoned his claim to double indemnity, conceding that a provision for automatic termination of the double idemnity provision upon the insured's entry into the military service of this country while engaged in war was applicable and barred recovery under the double indemnity provisions. The double indemnity provisions also contained war and aviation limitations similar to those hereinafter adverted to, and it is clear that if, upon the showing made, the plaintiff is not entitled to recover the face amount of the policy, he is not entitled to anything under the double indemnity provisions.

The policy contained a provision, the pertinent part of which provides:

> "If the death of the Insured shall result from
>
> "(1) an act of war or any act incident to war, provided such act occurs while the Insured is in the military or naval service of any country engaged in war and that such death occurs while the Insured is in such service or within six months thereafter; or
>
> "(2) operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger of a commercial airline and flying on a regularly scheduled route between definitely established airports; or
>
> "(3) an act of war or any act incident to war, provided such act occurs while the Insured is outside the forty-eight states of the United States of America, the District of Columbia, and the Dominion of Canada and that such death occurs within two years from the date of issue of this Policy,
>
> the amount payable under this Policy shall be a sum equal to the premiums paid to and received by the Company under this Policy for the face amount of this Policy (or the reserve on the face amount of this Policy at the date of death of the Insured, if greater), plus the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend deposits, and less any indebtedness hereon."

The Court has the deepest sympathy for the plaintiff. I, too, had sons in the war, two of them, and while both of them returned safely to this Country and to their homes, I know the sense of loss the plaintiff feels.

But the Court must determine the legal relation of the parties, not on the basis of sympathy for the plaintiff, but upon established legal principles. The evidence submitted

admits of no other reasonable conclusion than that the death of the insured resulted from an act of war or an act incident thereto and that it also resulted from operating or riding in an aircraft other than as a fare-paying passenger, and the Court must so hold.

The provisions of the policy with respect to war and aviation risks are reasonable. Those risks are widely regarded as extra-hazardous and it is entirely proper for the insurance company and the insured to agree, as they did here, that the insurance will not cover such risks. It is widely understood that the premiums to be paid are computed with reference to such provisions and it is standard practice to require additional premiums for the assumption of such risks. Unquestionably those provisions of the policy are binding upon the plaintiff, and if the death of the insured resulted either from an act of war or an act incident thereto or from operating or riding in any kind of aircraft other than as a fare-paying passenger, etc., the plaintiff can not recover more than the sum of $101.49 which the defendant admits is due.

The Court can see no other reasonable conclusion than that the insured's death did result from an act of war or an act incident thereto within the meaning of the language of the policy. The insured was an officer in the army, proceeding on a military mission as a member of the crew of a military plane.

While it is true that the Japanese had formally surrendered a few weeks earlier, that surrender did not terminate the war. The State of War between the two nations, as declared by the Congress, continued. See *West v. Palmetto State Life Ins. Co.*, 202 S. C. 422, 25 S. E. (2d) 475.

There was here causal connection between the war and the death of the insured. The insured was one of those millions of young men who went into the army in time of war. But for the war the insured would not have been present in that area, and probably would never have been

in the army. Certainly but for the war, he would not have been flying in that military plane on that military mission.

The movement of the thousands of troops homeward from what so recently had been the scene of terrific fighting was only in its early stages when the insured met his death while performing a mission in furtherance of that movement. The movement homeward of those thousands who had fought so bravely was just as causally related to the war as the earlier movement of those troops outward to battle areas had been. Each was occasioned solely by the war; each was an act incident to the war. The causal connection which was lacking in *Smith v. Sovereign Camp W. O. W.*, 204 S. C. 193, 28 S. E. (2d) 808, is present here and I can not but conclude that the insured died as a result of an act incident to war.

The evidence also admits of no other reasonable conclusion than that the insured died as a result of the plane flight. The flight is the very substance of the suit. The plaintiff would have no possible claim except for the death of the insured and the conclusion that the insured died is predicated upon the plane flight.

The evidence shows that the conclusion that the insured was killed rests solely upon the fact of the flight, the disappearance of the plane and the fruitless search of sea and land for the plane and its occupants. The army necessarily determined officially that the facts justified the conclusion of death. That conclusion seems reasonable and proper. But when the conclusion that the insured was killed is bottomed solely on the fact of the flight, it seems utterly impossible to allege the insured's death and at the same time to support an inference that the insured's death did not result from the flight.

The plaintiff suggests that the plane might have landed upon the water and the insured escaped uninjured to die later of drowning or other perils of the area in which the plane might have gone down. The defense is an affirmative

one, but if the Court assumes the hypothesis suggested by the plaintiff, the Court must still conclude that the death resulted from the flight within the meaning of the policy.

Many perils are real and obvious when flying over ocean expanses. That the plane may explode in mid-air may be one. That it may come into such violent contact with the ocean surface that its occupants are mortally injured is another. But the risk of drowning upon being precipitated into an unfriendly ocean far from land and succor is certainly another obvious, forseeable, well recognized risk of such flight. Indeed having undertaken the flight, an ensuing casualty must be said to result from it unless, meanwhile, the occupants of the plane have reached a position of safety. It seems to this Court to matter not in what particular fashion the death may eventuate, so long as the flight leads through an unbroken chain of events without an efficient intervening cause to the death. Accepted principles of proximate causation should be applied, and, so applied, the only reasonable inference in this case is that the death resulted from the flight.

While the Supreme Court of South Carolina, whose decisions alone are binding upon this Court, seems never to have considered this question, there is abundant and persuasive authority from other jurisdictions in support of the views above expressed. *King v. United Commercial Travelers of America*, 167 Fed. (2d) 108 (C. C. A. 4th 1947); *Neel v. Mutual Life Insurance Co.*, 131 Fed. (2d) 159 (C. C. A. 2nd 1942); *Green v. Mutual Benefit Life Insurance Co.*, 144 Fed. (2d) 55 (C. C. A. 1st 1944).

The recent case decided by the Fourth Circuit Court of Appeals (*King v. United Commercial Travelers of America, supra*) arose in this State, and I find the reasoning of that decision persuasive.

Counsel for the plaintiff has referred to a decision of Judge Sease in the Court of Common Pleas for Spartanburg County in the case of *King v. Commonwealth Life In-*

surance Company of Louisville, Ky. In that case Judge Sease relied upon and followed the decision of Judge Wyche, subsequently reversed, in the Federal District Court in the case of *King v. United Commercial Travelers.* But for the fortuitous circumstance that Judge Sease's decision was rendered in the interim between the District Court decision in the United Commercial Travelers case and the reversal of the District Court by the Circuit Court of Appeals, Judge Sease would probably have reached a different conclusion.

Other Circuit Judges in this State may have reached conclusions different from Judge Sease's in similar cases, but whatever their conclusions and whatever the basis of Judge Sease's reasoning, this Court looks only to the Supreme Court of South Carolina for guidance and direction. The decisions of other courts are persuasive only to the extent their reasoning is persuasive to the mind of this Court. This Court finds the reasoning of the Circuit Court of Appeals in the recent King case persuasive and sound.

When the assumption of death, reasonable and proper as it is, is predicated upon the fact of the flight, the evidence admits of no other reasonable conclusion than that the death resulted from the flight. This conclusion is unaffected by any hypothesis we might adopt as to the particular circumstances by which the death eventuated. The eventuality might have come about in various ways, but clearly the eventuality resulted from the flight.

Since it appears to this Court that the evidence is susceptible of no other reasonable conclusion than that the insured died as the result of an act of war or of an act incident to war and that he also died as the result of operating or riding in an airplane, not as a fare-paying passenger, I must for both reasons grant the defendant's motion.

I therefore direct a verdict for the plaintiff for One Hundred and One and 49/100 ($101.49) Dollars.

WM. H. GRIMBALL,
Presiding Judge

November 19, 1947.

STATE OF SOUTH CAROLINA,
COUNTY OF GREENVILLE.

I, T. E. Christenberry, Clerk of the Court of Common Pleas and General Sessions, in and for the County and State aforesaid, do hereby certify that the foregoing is a full and correct copy of the original of an order in the case wherein Gilman F. Thompson, Sr. was Plaintiff and New York Life Insurance Company was Defendant; that the original of said order was duly filed in this office on the 20th day of November, 1947 and is now on file therein as a part of the record in the aforementioned case.

I further certify that Honorable W. H. Grimball is the duly elected and qualified Circuit Judge of the Ninth Judicial Circuit for the State of South Carolina and was duly and regularly assigned to the Thirteenth Judicial Circuit, which includes the County of Greenville, for the fall of 1947 and was the Presiding Judge before whom the before mentioned case was tried.

In Testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Greenville, South Carolina, this 24th day of November, 1947.

(Official Seal)

T. E. CHRISTENBERRY,
Clerk of Court of Common Pleas and of Court of General Sessions